No. 80-577

IN THE

# Supreme Court of the United States

October Term, 1980

HOGAN & HARTSON and MERLE THORPE, JR.,

*Petitioners,*

*against*

INTERNATIONAL CONTROLS CORP.,

*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI


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## Question Presented

Should this Court grant certiorari to review the appealability of an order denying a motion to disqualify respondent's counsel where (i) the District Court found no factual or legal support for the asserted substantive issue underlying the motion and further found no "taint" to the proceedings, and, accordingly, no substantive basis for disqualification under the applicable law of the Second Circuit and (ii) the procedural issue of appealability has already been briefed and is about to be reviewed by this Court.

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent International Controls Corp. respectfully submits this brief in opposition to the petition of Hogan & Hartson and Merle Thorpe, Jr. for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

## Statement of the Case

Petitioners Hogan & Hartson, a Washington, D.C. law firm, and Thorpe, a partner of Hogan & Hartson, previously represented respondent and Robert Vesco during the time respondent was controlled and directed by Vesco. In addition, Thorpe was a director of respondent during that period. This suit, commenced in November 1977, alleges that petitioners aided and abetted Vesco's violations of the federal securities laws and committed legal malpractice, breach of fiduciary duty and other wrongdoings, causing substantial damage to respondent.

As a result of an enforcement action, brought by the Securities and Exchange Commission, naming Vesco, respondent and numerous others as defendants, *SEC* v. *Vesco,* 72 Civ. 5001 (S.D.N.Y.), respondent consented to a final judgment enjoining it from violating various provisions of the securities laws (215a).* The consent judgment also provided for appointment of a "Special Counsel" for respondent and other relief.

Under the terms of the consent judgment, Special Counsel was authorized and directed, *inter alia,* to

> (a) conduct a full investigation . . . into the financial and other affairs of International Controls, and report to this Court and plaintiff Commission his findings and recommendations for action [and] . . .

* Consistent with the petition in this case, references to the appendices to the petition are designated "App. ——," and references to the joint appendix filed in the Second Circuit Court of Appeals and submitted with the petition, are designated "——a."

> (b) *take all appropriate action, including* but not limited to, *the institution and prosecution of suits on behalf of International Controls* . . . .

(218a) (emphasis added).

Shortly thereafter, David Butowsky was appointed Special Counsel for ICC (65a) and embarked on his investigation, which resulted in a detailed report setting forth Special Counsel's findings and recommendations, including a recommendation that the instant action be brought against petitioners.

On or about November 23, 1977, Butowsky applied to the District Court for an order authorizing the filing of the complaint (225-58a). The application was duly granted by the District Court by order dated November 28, 1977 (225a), and on November 29, 1977, the complaint was filed (2a).

In June 1978, petitioners filed their second motion to disqualify Butowsky's law firm, Gordon Hurwitz Butowsky Baker Weitzen & Shalov, from continuing to act as respondent's litigation counsel (110a).* It is that motion which resulted in the order of which review is now sought in this Court.

The District Court denied the motion and held that petitioners "have failed to raise any issue which the Court believes constitutes a violation of Canon 5 [of the Code of Professional Responsibility] or which 'undermines [its] confidence' in the vigor of Gordon Hurwitz's representation of ICC in this action." (App. 8). In addition, the District

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* In March 1978, petitioners also had moved to disqualify Special Counsel and his firm (37a). Following a conference at which the District Court expressed its intention to deny the motion (112a), it was withdrawn by petitioners (109a).

Court found that there was no "taint" of the proceedings, and petitioners did not even assert any prejudice to them by virtue of the Gordon Hurwitz firm's representation of respondent (App. 7). *See Board of Education of New York City* v. *Nyquist,* 590 F.2d 1241 (2d Cir. 1979).

The District Court's closing comments on petitioners' motion are of particular importance in this Court's consideration of whether to grant a writ of certiorari in this case:

> In the present case, the parties have fought as if in a major war over a motion to disqualify plaintiff's counsel made by defendants on grounds which focus primarily on the interests of ICC, which secondarily involve the public interest, and which only incidentally refer to possible prejudice to defendants themselves. *Even assuming that defendants in fact have acted with the purest of motives, the appearance is that they have been engaged in a strategic ploy which has already succeeded in stalemating this litigation for months and which will in all probability continue to do so as the result of an appeal.* In this Court's view, a greater loss of public confidence in the judicial system and the legal profession would result from granting a motion for disqualification under these circumstances than from allowing Gordon Hurwitz to continue representation of ICC in this action.

App. 16-17 (emphasis added).

After petitioners' appeal from the District Court order was briefed and argued in the Second Circuit, the Court of Appeals rendered its en banc decision in *Armstrong* v. *McAlpin,* 625 F.2d 433 (2d Cir.), *petition for cert. filed,* 49 U.S.L.W. 3190 (U.S. Sept. 30, 1980) (No. 80-431). There-

after, the Court of Appeals dismissed the appeal in this action. As we argue below, *see* pp. 7-8, *infra,* in view of the Second Circuit's consideration on the merits of those appeals from denials of disqualification motions that were pending in the Court of Appeals at the time of the en banc opinion in *Armstrong,* the dismissal of the appeal in this case should be viewed as a determination on the merits of petitioners' claim.

## Reasons for Denying the Writ

1. Petitioners seek this Court's review of the order of the Second Circuit Court of Appeals for the sole reason that a conflict exists among the circuits regarding whether or not orders denying motions to disqualify counsel are appealable under 28 U.S.C. § 1291. Petitioners make no effort, and indeed would be hard pressed, to argue that the underlying issue of disqualification has sufficient importance to warrant this Court's attention.

While a conflict among the circuits or between a decision of a court of appeals and this Court are necessary conditions for the exercise by this Court of its review powers, such a conflict, standing alone, is seldom a sufficient basis for the grant of a writ of certiorari. This Court has frequently denied review despite an asserted conflict among the circuits, *e.g., Maryland* v. *Marzullo,* 435 U.S. 1011 (1978); *Dupuy* v. *Dupuy,* 434 U.S. 911 (1977), or between a court of appeals and this Court, *e.g., Cleveland Board of Education* v. *Reed,* 445 U.S. 935 (1980).

Among the reasons for its denying review, this Court will not generally undertake a review which might "risk

inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute,'' *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955), as, for example, when a case turns on its facts. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Moreover, even where there is an asserted conflict among the circuits, the case must present ''an issue of immediate public significance.'' *Rice* v. *Sioux City Memorial Park Cemetery, Inc., supra*, 349 U.S. at 78-79 & n.2. *See also Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, 445 U.S. 907, 910-11 (1980) (White, J., dissenting from denial of certiorari).

In this case, a review by this Court would clearly not involve any issue of ''immediate public significance.'' The disqualification issue which petitioners raised in the courts below presented virtually no issues of significance, as is evident from the opinion of the District Court. Petitioners could present no coherent theory, let alone any set of facts, to indicate that they or any other party or third persons had been prejudiced by any conduct of the Special Counsel or his attorneys nor did they indicate any way in which the trial of this matter might be tainted by Special Counsel's retention of his law firm to prosecute this massive securities fraud action. Significantly, the District Court clearly and pointedly indicated that petitioners' motion had the appearance of ''a strategic ploy which has already succeeded in stalemating this litigation for months . . . .'' (App. 16).

Finally, petitioners argue that the issue of appealability, to which they have artfully limited their petition, has importance. However, this Court has already agreed to re-

view the issue of appealability sought to be presented in this case by granting the petition for a writ of certiorari in *Firestone Tire & Rubber Co.* v. *Risjord,* 48 U.S.L.W. 3733 (U.S. May 12, 1980) (No. 79-1420), and that case will soon be argued to this Court. 49 U.S.L.W. 3304 (U.S. Oct. 28, 1980). By reason of the grant of the petition in *Firestone,* this Court has assured that the public interest in having this procedural issue resolved, *cf., United States* v. *W.T. Grant Co.,* 345 U.S. 629, 632 (1953); *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290, 309-10 (1897), as well as the paramount interest in the uniformity of interpretation under 28 U.S.C. § 1291 will be served, and a uniform rule, establishing the proper procedure in all of the federal courts, will be promulgated.

In sum, far from bringing a matter of public importance before this Court, the petition in this case, if it has any interest at all, is important only to the petitioners as "a stragetic ploy" for delaying or impeding prosecution of serious allegations of wrongdoing.

2. In *Armstrong* v. *McAlpin, supra,* 625 F.2d 433, the Second Circuit announced that it was overruling its prior holdings on the appealability issue and would henceforth treat denials of motions seeking to disqualify counsel as non-appealable collateral orders. 625 F.2d at 437-41. *See Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949). The Second Circuit nevertheless reached the merits of the disqualification issue—and affirmed the District Court—because, among other reasons, "it would be an enormous waste of judicial resources simply to dismiss the appeal . . . ." 625 F.2d at 442. Similarly, in *Cheng* v. *GAF Corp.,* Dkt. No. 80-7254, slip op. 5195 (2d Cir. Aug. 26, 1980), the Second Circuit, although reiterating that denials of mo-

tions to disqualify counsel are not appealable, nevertheless reached the merits—and reversed the District Court. As the court stated:

> Since this appeal was filed, briefed, argued, and considered prior to the filing of the *Armstrong* decision, our disposition of the appeal on the merits will neither crowd the appellate docket nor delay the litigation below. On the other hand, for us to dismiss the appeal at this stage would entail a needless waste of both judicial and private resources. Cheng's appeal was filed in full compliance and proper reliance on the pre-*Armstrong* law of this Circuit. The evils the *Armstrong* decision is intended to avoid have already occurred in the instant case and cannot be undone by dismissal at this stage of the proceedings. Consequently, we can see no justification for wasting the time and resources of the parties, the trial court and this Court by requiring Cheng to re-appeal at a later date. Nor do we view *Armstrong* as intending such a result.

*Cheng* v. *GAF Corp., supra,* slip op. at 5199 n.2. *See also In re Multi-Piece Rim Products Liability Litigation,* 612 F.2d 377, 379 (8th Cir.) (en banc), *cert. granted sub nom. Firestone Tire & Rubber Co.* v. *Risjord,* 48 U.S.L.W. 3733 (U.S. May 12, 1980); *Melamed* v. *ITT Continental Baking Co.,* 592 F.2d 290, 295 (6th Cir. 1979).

Here, as in *Cheng* and *Armstrong,* the appeal by petitioners was filed, briefed and argued prior to the en banc decision in *Armstrong.** Given the Second Circuit's consideration of the merits in these pre-*Armstrong* appeals, it is apparent that the Second Circuit in this case did not see any merit in petitioners' appeal. Accordingly, any

* Indeed, this case was argued prior to the Second Circuit's determination to rehear *Armstrong* en banc.

ruling by this Court which would have the effect of remanding the case for appellate consideration of the disqualification issue would be wasteful of judicial resources.

## Conclusion

The petition for a writ of certiorari should be denied in all respects.

Dated: November 7, 1980

Respectfully submitted,

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